

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

VIRGIN VALLEY WATER DISTRICT,

Plaintiff,

v.

VANGUARD PIPING SYSTEMS
(CANADA), INC.; et al.,

Defendants.

2:09-cv-00309-LRH-PAL

ORDER

Before the court is defendants VG Pipe, LLC; Viega, LLC; and Viega NA, Inc.'s (collectively "defendants") motion for partial summary judgment number 1 as to \$12,000,000 in damages for future secondary street re-paving. Doc. #121.¹ Plaintiff Virgin Valley Water District ("Virgin Valley") filed an opposition (Doc. #140) to which defendants replied (Doc. #158).

I. Facts and Background

Virgin Valley is a political subdivision of the State of Nevada and is responsible for the care and maintenance of underground residential water service lines in and around Mesquite, Nevada. This action arises out of Virgin Valley's allegations that the high-density water pipe used in the construction of its underground water service lines was defectively designed and/or manufactured by defendants.

On February 13, 2009, Virgin Valley filed a complaint against defendants for damages

¹ Refers to the court's docket entry number.

1 resulting from the leak of defendants' manufactured polyethylene pipe. Doc. #1. On February 16,
 2 2010, Virgin Valley filed an amended complaint against defendants alleging six causes of action:
 3 (1) products liability; (2) strict products liability; (3) breach of implied warranty; (4) breach of
 4 warranty of merchantability; (5) negligence; and (6) negligent misrepresentation. Doc. #79.
 5 Thereafter, defendants filed the present motion for partial summary judgment as to Virgin Valley's
 6 claim for \$12,000,000 for future secondary re-paving expenses.² Doc. #121.

7 **II. Legal Standard**

8 Summary judgment is appropriate only when "the pleadings, depositions, answers to
 9 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
 10 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
 11 of law." Fed. R. Civ. P. 56(c). In assessing a motion for summary judgment, the evidence, together
 12 with all inferences that can reasonably be drawn therefrom, must be read in the light most
 13 favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
 14 U.S. 574, 587 (1986); *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir.
 15 2001).

16 The moving party bears the burden of informing the court of the basis for its motion, along
 17 with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*,
 18 477 U.S. 317, 323 (1986). On those issues for which it bears the burden of proof, the moving party
 19 must make a showing that is "sufficient for the court to hold that no reasonable trier of fact could
 20 find other than for the moving party." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir.
 21 1986); *see also Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1141 (C.D. Cal. 2001).

22 To successfully rebut a motion for summary judgment, the non-moving party must point to
 23 facts supported by the record which demonstrate a genuine issue of material fact. *Reese v. Jefferson*
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25 ² The damage claim for future secondary re-paving expenses is based on the future re-paving of streets
 26 in Mesquite, Nevada where Virgin Valley has yet to replace a leaking pipe and re-patch the street.

1 *Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000). A “material fact” is a fact “that might affect the
2 outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
3 (1986). Where reasonable minds could differ on the material facts at issue, summary judgment is
4 not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A dispute regarding a material
5 fact is considered genuine “if the evidence is such that a reasonable jury could return a verdict for
6 the nonmoving party.” *Liberty Lobby*, 477 U.S. at 248. The mere existence of a scintilla of
7 evidence in support of the plaintiff’s position will be insufficient to establish a genuine dispute;
8 there must be evidence on which the jury could reasonably find for the plaintiff. *See id.* at 252.

9 **III. Discussion**

10 During discovery, Virgin Valley provided defendants with its final damage calculation.
11 Included in that supplemental disclosure is a claim for \$12,000,000 in future secondary re-paving
12 expenses. Defendants argue that they are entitled to judgment as a matter of law on that claim
13 because: (1) Virgin Valley does not have standing to assert a claim for street re-paving because
14 Virgin Valley does not own the streets at issue; (2) the damage claim was untimely; and (3) the
15 \$12,000,000 claim is entirely speculative. *See* Doc. #121. The court shall address each argument
16 below.

17 **A. Standing**

18 Defendants argue that because Virgin Valley does not own the roads at issue, and as such, it
19 does not have standing to sue for the costs of re-paving the streets affected by the repair and
20 replacement of defendants’ allegedly defective product. *See* Doc. #121.

21 The court has reviewed the documents and pleadings on file in this matter and finds that
22 Virgin Valley has standing to assert its claim for future secondary street re-paving. Virgin Valley is
23 a state agency that operates the residential and business water district in Mesquite, Nevada. Virgin
24 Valley has a possessory right to use the roads of Mesquite for the purpose of building, repairing,
25 and maintaining its pipe network. Further, Virgin Valley has an obligation to repair damage to the
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1 streets caused during the replacement and repair of its underground pipes. Therefore, the court
2 finds that Virgin Valley has standing to assert a claim for street re-paving costs associated with the
3 repair and replacement of defendants' allegedly defective underground pipe.

4 **B. Timeliness**

5 Defendants argue that Virgin Valley's claim for future secondary street re-paving was not
6 disclosed until less than a month before the discovery cut-off date and was therefore untimely
7 under the Federal Rules of Civil Procedure. *See* Doc. #121.

8 Federal Rule of Civil Procedure 26 requires a party to provide a damage computation as an
9 initial disclosure. FED. R. CIV. P. 26(a)(1)(iii). Further, Rule 26(e)(1) requires a party to
10 supplement its initial disclosures if the initial disclosures were incomplete or incorrect. FED. R.
11 CIV. P. 26(e)(1). Information required to be provided under Rule 26 is properly excluded by the
12 court if it was not disclosed to the opposing party unless the failure to disclose was substantially
13 justified or was harmless. FED. R. CIV. P. 37(c)(1); *Wong v. Regents of Univ. of Cal.*, 379 F.3d
14 1097, 1105 (9th Cir. 2004).

15 Here, the court finds that Virgin Valley's future secondary street re-paving damage claim
16 was timely, and therefore, should not be excluded. The claim was provided to defendants as a
17 supplemental disclosure to its original damage computation and was included with twelve other
18 supplemental disclosures during the discovery period. The supplemental disclosure was based on
19 Virgin Valley's retained experts' reports which were not available until at the time of initial
20 disclosures. Further, the court finds that defendants were not prejudiced by the disclosure because
21 there was still sufficient time in discovery to address the claim. Therefore, the court finds that the
22 supplemental disclosure was timely.

23 **C. Speculative Damages**

24 Defendants argue that Virgin Valley's claim for \$12,000,000 in future secondary re-paving
25 damages is unsupported and speculative, and as such, should be denied as a matter of law. *See*
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1 Doc. #121. Specifically, defendants argue that there is no expert testimony supporting the claim for
2 future re-paving expenses and that the underlying mathematical computation is based on
3 unsupported figures.

4 Viewing all the evidence in the light most favorable to Virgin Valley as the non-moving
5 party, the court finds that the calculated future damages are not speculative. The damages are based
6 on Virgin Valley's retained experts' reports and opinions. Specifically, retained expert Leslie
7 Henley's ("Henley") calculated price for re-pavement of \$9,419.00 per patch multiplied by
8 retained expert Peter Badala's ("Badala") projected number of future patches due to future failing
9 pipes, 1326. *See* Doc. #140. Although defendants contend that there is no evidence to support these
10 future pipe failings, Virgin Valley's retained experts opine that defendant's pipes will continue to
11 leak for the next fifty years, and as such, there will be a need to re-pave subsequent patches. *See*
12 Doc. #146, Exhibit 5. Further, damages are not improperly speculative simply because they cannot
13 be ascertained with exact mathematical precision. *Health Call of Detroit v. Atrium Home & Health*
14 *Care Services, Inc.*, 706 N.W.2d 843, 852 (Mich. 2005). Virgin Valley's damage claim is plainly
15 presented and determinable. Therefore, based on the record before the court, and the documents
16 and pleadings on file in this matter, the court finds that Virgin Valley's claim for future secondary
17 re-paving damages is not so speculative as to warrant denial as a matter of law. Accordingly, the
18 court shall deny defendants' motion.

19 IT IS THEREFORE ORDERED that defendants' partial motion for summary judgment
20 number 1 (Doc. #121) is DENIED.

21 IT IS SO ORDERED.

22 DATED this 5th day of February, 2011.



23
24
25 LARRY R. HICKS
UNITED STATES DISTRICT JUDGE